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In the Supreme Court of the United States

OCTOBER TERM, 1976

MAX H. HOMER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-15a) is reported at 545 F. 2d 864. The memorandum opinion of the district court denying petitioner's motion for a new trial (Pet. App. 17a-37a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1976 (Pet. App. 16a). A petition for rehearing was denied on December 28, 1976 (Pet. App. 4a). Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including February 26, 1977. The petition was filed on February 28, 1977, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial judge committed reversible error by refusing to allow nine witnesses to give hearsay testimony that the proceeds of petitioner's extortion scheme were used as a political contribution.

2. Whether the trial judge erred in refusing to admit hearsay testimony by two other witnesses regarding an alleged plan to frame petitioner.

3. Whether the court properly submitted the case to the jury under the theory that petitioner violated the Hobbs Act, 18 U.S.C. 1951, by extortion under color of official right.

RULE INVOLVED

Rule 804(b), Fed. R. Evid., provides in pertinent part:

> **Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
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> * * * * *
>
> (3) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.
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> * * * * *

> (5) **Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. * * *

STATEMENT

After a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of two counts of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951, and one count of perjury, in violation of 18 U.S.C. 1623.[1] Petitioner was fined $3,000 on each count, and was sentenced to concurrent four-year prison terms on the two extortion counts and to a consecutive four-year term on the perjury count. The court of appeals affirmed (Pet. App. 5a-16a).

The evidence at trial established that while petitioner was a member of the House of Representatives of the Commonwealth of Pennsylvania, he extorted funds from representatives of two companies—the Gordon Terminal Service Company ("Gordon Terminal"), and Ruthrauff, Inc. ("Ruthrauff")—both of which are located in McKees Rocks, Pennsylvania.

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[1]Petitioner was acquitted on four other counts charging attempted extortion, obstruction of justice, income tax evasion, and false filing of an income tax return.

In June 1971, Gordon Terminal, a chemical and petroleum processing company, was preparing to move a large quantity of materials into a newly constructed warehouse that was essential to the operation of its business (Tr. 250-251, 259-265, 378-379). At that time, a state safety inspector named Ernest Bulgarelli informed Thomas Gordon, an officer of the corporation, that because of minor construction defects the building could not be occupied (Tr. 379). Bulgarelli suggested that Gordon meet with petitioner for assistance (Tr. 197, 381), and a meeting took place attended by petitioner, Gordon, and Ralph Castelucci, the manager of the new Gordon Terminal warehouse (Tr. 251-252). Subsequently, petitioner demanded $15,000 to $20,000 to rectify Gordon's mistake of not supporting a political candidate. When Castellucci pleaded financial difficulties, petitioner agreed to accept a payment of $5,000 in cash, to be paid directly to petitioner, with another $1,500 to be sent to Balobeck Associates, a local company that performed no services for Gordon Terminal (Tr. 262, 295-296, 304, 322, 338, 389-393, 413).[2] After this payment to petitioner, no problems were encountered concerning occupancy of the warehouse (Tr. 294-297, 391-393).

In a similar transaction, petitioner extorted $3,010 from a representative of Ruthrauff, another local corporation. Ruthrauff also had an urgent need to occupy a new building that had been inspected and found unacceptable by Bulgarelli (Tr. 47-51, 74-91, 164-166, 176).

ARGUMENT

1. Petitioner asserts (Pet. 7-12) that the trial judge improperly refused to allow nine defense witnesses to

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[2]Originally, petitioner asked for a $1,500 check payable to a newspaper to which the local Democratic party owed an advertising bill.

give hearsay testimony that the late Patsy Bruno, treasurer of the local Democratic Party Campaign Committee, stated in 1971 that petitioner had told him that a $5,000 political contribution for the party had been received by petitioner from Gordon's company (Tr. 523, 704). The trial court excluded this testimony primarily because the defense had already introduced a notarized official election record signed by Bruno that reflected the same information (Tr. 715, 752-755, 1337-1338).[3]

There was no reversible error in this ruling. This evidence was offered as a defense to the income tax evasion charges of which petitioner was acquitted; he therefore may not now complain of its exclusion on the extortion counts on which he was convicted.[4] See Fed. R. Evid. 103(a)(2); see also *Shaw* v. *Scoville*, 369 F. 2d 909, 912 (C.A. 2). As the court of appeals stated (Pet. App. 11a): "Inasmuch as the appellant was acquitted of the income tax evasion counts, we find no reversible error in the exclusion of testimony offered as a defense to those charges." The evidence offered was not relevant to a defense to the extortion charge (Pet. App. 11a). That the proceeds of petitioner's extortion scheme may have been

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[3]In addition to the documentary evidence, three witnesses were allowed to testify that petitioner had informed them of a campaign contribution from Gordon (Tr. 940, 951, 992, 1360, 1369), and Bruno's wife testified that petitioner had given her husband a sum of money for campaign purposes (Tr. 779). In these circumstances, the testimony of the other nine witnesses would have been cumulative. See Fed. R. Evid. 403.

[4]In arguing for the admissibility of the testimony defense counsel described the specific purposes for which it was offered (Tr. 706):

> This is the defense to the income tax count. If he [petitioner] did not use it, and if he took the money by extortion under the most gross circumstances and gave it to the nunnery, he wouldn't be guilty of income tax evasion but might be guilty of extortion.

received for the benefit of a political committee, or treated by petitioner as a political contribution, does not lessen his culpability for extortion under the Hobbs Act. See *United States* v. *Trotta*, 525 F. 2d 1096 (C.A. 2), certiorari denied, 425 U.S. 971.

2. Petitioner also contends that the trial court's refusal to allow him an opportunity to present certain other hearsay evidence through two additional witnesses was reversible error (Pet. 12-14).

According to petitioner's offer of proof at trial, Michael Hamuicka and one additional defense witness, if permitted to testify, would have stated that in 1972 Hamuicka had a conversation with one Michael Ciamocco, Jr., a local gambling figure. Ciamocco allegedly wished to establish a "crap game" in Hamuicka's lounge, but Hamuicka refused, stating that if pressure were applied he would contact petitioner for assistance. Ciamocco then allegedly informed Hamuicka that petitioner would be of no value to him, because Ciamocco had made arrangements to frame petitioner through the use of an "oil man and a heating man" (Tr. 927-928, 932).[5] Petitioner argues (Pet. 12-14) that Ciamocco's statement concerning his role in an arrangement to frame petitioner constituted a declaration against Ciamocco's penal interest admissible under Rule 804(b)(3) of the Federal Rules of Evidence.[6]

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[5]Gordon Terminal was engaged in the business of oil storage and shipment (Tr. 246-247). The activities of Ruthrauff included the installation of heating equipment (Tr. 73).

[6]Ciamocco, when called as a witness at trial, invoked his Fifth Amendment privilege against self-incrimination and refused to testify (Tr. 1062-1064). He was therefore unavailable as a witness under the provisions of Fed. R. Evid. 804 (a)(1).

Rule 804(b)(3), however, contains the explicit caveat that such "[a] statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." In this case, no corroborative evidence was offered to indicate the existence of any plot to frame petitioner. In addition, the circumstances surrounding Ciamocco's alleged statements indicated that they were not trustworthy. Thomas Gordon testified that he did not know Ciamocco (Tr. 425-426), and the manager of Gordon Terminal stated that while he knew the Ciamocco family, he had never discussed the matter with them (Tr. 330). Furthermore, the extortion of Gordon Terminal took place in 1971, and petitioner's offer of proof indicated that Ciamocco's intent to frame petitioner was expressed in 1972. No explanation was offered why the purported plot remained dormant until 1973, when the investigation of petitioner commenced (Tr. 1699-1700). Under these circumstances, the trial court properly excluded the hearsay evidence offered by petitioner.[7]

In any event, declarations against penal interest are admissible under Rule 804(b)(3) only if "a reasonable man in [the declarant's] position would not have made the statement unless he believed it to be true." This requirement is included in the rule because the statement against interest exception is "founded on the assumption that a person is

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[7]The trial judge stated that he would accept non-hearsay evidence indicating that a plan existed to frame petitioner (Tr. 1068):

> * * * I want to make it clear to the defendant that if he has any evidence that Laux [President of Ruthrauff] or Gordon or Castelucci [Manager of Gordon Terminal] were put up to frame this man, any direct evidence, either by them or by somebody who heard them say it, I don't regard that as being collateral to this case.

unlikely to fabricate a statement against his own interest at the time it is made." *Chambers* v. *Mississippi*, 401 U.S. 284, 299. This assurance of reliability is not present here since, as a practical matter, Ciamocco had much to gain from his statement. The offered proof described Ciamocco as seeking to pressure Hamuicka into accepting an illegal gambling operation in his establishment. Since Ciamocco was attempting to coerce Hamuicka into accepting his illicit dictate, he would have been expected to use any stratagem necessary, including the fabrication of a story designed to undermine Hamuicka's expectation of petitioner's help.[8] Evidence of Ciamocco's alleged statement was therefore properly excluded as unreliable hearsay (Tr. 932). See *United States* v. *Harris*, 501 F. 2d 1 (C.A. 9); *United States* v. *Pena*, 527 F. 2d 1356 (C.A. 5), certiorari denied, 426 U.S. 949.

3. Finally, petitioner asserts (Pet. 15) that the trial court erred in submitting the case to the jury under the theory that petitioner violated the Hobbs Act by extortion under color of official right. Petitioner does not detail the basis for this contention, but apparently seeks to raise the issue presented in *United States* v. *Mazzei*, 521 F. 2d 639 (C.A. 3), certiorari denied, 423 U.S. 1014—whether a state official without

[8]This case is thus unlike *Chambers*, *supra*, where this Court found that due process permitted the admission of certain statements against penal interest where the statements "bore persuasive assurances of trustworthiness," including the fact that the declarant "stood to benefit nothing" by his disclosures. 410 U.S. at 301, 302. *United States* v. *Iaconetti*, 406 F. Supp. 554 (E.D. N.Y.), also relied on by petitioner, involves the application of Fed. R. Evid. 803(24) to the particular facts of that case. In addition, the statement there was made "close on the heels of the criminal event and to persons with whom it was appropriate and even necessary to communicate." 406 F. Supp. at 559. By contrast, the extortion events here occurred in 1971, the conversation allegedly indicating the plot to frame petitioner took place in 1972, and the investigation and prosecution were not initiated until 1973.

power to confer the benefit sought may be found guilty of extortion under color of official right under the Hobbs Act in circumstances where the official exploited the victim's reasonable belief that the official possessed that authority. For the reasons discussed in our Brief in Opposition in *Mazzei* (No. 75-313, October Term 1975), this issue does not merit further review.[9]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[9]We are sending petitioner's counsel a copy of our Brief in Opposition in *Mazzei*.

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